Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

October Term, 1980

J. GREGORY MERRION, ET AL.,

Petitioners,

JICARILLA APACHE TRIBE, ET AL.,

Respondents.

AMOCO PRODUCTION COMPANY, ET AL.,

Petitioners,

JICARILLA APACHE TRIBE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WESTMORELAND RESOURCES, INC.

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Westmoreland Resources, Inc., moves the Court to leave to file a Brief Amicus Curiae in the form attached to this Motion for the following reasons:

1. Westmoreland Resources, Inc. mines coal in Montana under a lease from the Crow Tribe of Indians. It is subject to the Montana 30 percent coal severance tax and may be subjected to 25 percent coal severance tax which the Crow Tribe desires to impose on it. Because the imposition of both taxes would make its operations uneconomic, it has a very direct interest in whether or not (1) Indian tribes are held to have the power to tax non-Indians and (2) if they do, whether or not the combined effect of both a state and tribal severance tax violates the Commerce Clause.

2. On December 8, 1980, this Court decided that this case be set for oral argument in tandem with *Commonwealth Edison Company, et al. v. State of Montana, et al.* Nos. 80-581 which raises the question of whether or not the Montana Coal Severance Tax violates the Commerce Clause.

3. Because this joinder for argument suggests that the Court may be interested in seeking some solution to the conflicting interests of States, Indian tribes and mineral resource operators, Westmoreland Resources, Inc. desires that its views in this subject be considered by the Court.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE

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INTEREST OF WESTMORELAND RESOURCES, INC.

Westmoreland Resources, Inc. mines coal in Montana under a lease from the Crow Tribe of Indians. It is subject to the Montana 30 percent coal severance tax and may be subjected to a 25 percent coal severance tax which the Crow Tribe desires to impose on it. Because the imposition of both taxes would make its operations uneconomic, it has a very direct interest in whether or not (1) Indian tribes are held to have the power to tax non-Indians and (2) if they do, whether or not the combined effect of both a state and tribal severance tax violates the Commerce Clause.

Those issues are the subject of litigation instituted by the Crow Tribe against the State of Montana in the United States District Court for the District of Montana in which the Tribe claims the Montana tax is invalid because, among other things, the size of the tax interferes with its powers of self government. Westmoreland has intervened in that action claiming the Crow Tribal tax is invalid for many of the reasons advanced by Petitioners in this case *(Merrion, et al. v. Jicarilla Apache Tribe, et al* (Nos. 80-11 and 80-15)) and that the Montana tax in invalid for the reasons expressed by Petitioners in *Commonwealth Edison Company, et al. v. State of Montana, et al.* (Nos. 80-581). In noting probable jurisdiction in the *Commonwealth Edison Company* case, the Court directed that the *Merrion* case be considered with it for oral argument.

The *Crow Tribe* case is not yet ripe for adjudication by this Court. The Tribe's complaint was dismissed by the District Court by the theory that the incidence of the tax was on Westmoreland and not on the Tribe and that nothing in the constitution prohibited the imposition of both a state and tribal tax on the same activity. 469 F. Supp. 154 (D. Mont. 1954). The propriety of that dismissal was argued before the Court of Appeals for the Ninth Circuit (No. 79-4321) in January 1980, but no decision has yet been issued.

The power of Tribes to tax non-Indians is not addressed in this Brief because the proper resolution of that issue may turn on the facts of each case. This Brief does address the question of the power of both Tribes and States to impose multiple taxes on the same mining activity since that is the heart of the mineral producers interest, and the resolution of that issue has broad implications for the Nation's energy policy.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously found that a combined State and Indian tax on the same mineral severance could not violate the Commerce Clause because the tax was not imposed by more than one State. This Court held in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), that a state tax on the instrumentalities of foreign trade which had been taxed by Japan was invalid because it violated the foreign Commerce Clause. Since State and Tribal taxes on the same acts of mineral resorces may greatly impede the development of vast energy resources owned by Tribes, the principles adopted in the *Japan Lines* case should be applied in the case of interstate commerce arising from commerce with Indian tribes.

ARGUMENT

TRIBAL AND STATE TAXATION OF THE SAME MINING ACTIVITY VIOLATES THE COMMERCE CLAUSE.

The Court of Appeals in the *Merrion* case erroneously found that the imposition of both a State and Tribal tax on the same mineral severance "does not implicate the Federal interest in maintaining the flow of interstate commerce at all . . ." 617 F. 2d at 546. The only reason given by the court below for this astounding conclusion was that the prohibition against multiple taxation of interstate commerce applied only to multiple taxation by *states*. The Court concluded this rule could not apply because "It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation." 617 F. 2d at 546.

Multiple taxation of the same activity by different sovereigns necessarily interferes with the power granted Congress by Article I, §8 of the Constitution "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes," whether or not both sovereigns are States.

This Court's decision in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), established without question that the prohibition against multiple taxation of commerce is not limited to taxes imposed by two different states. In that case this Court found that the same principle applied to a conflict between a California tax on cargo containers and a previously imposed Japanese tax on the same containers and held that the state tax was invalid.

The reasons advanced by the Court for finding the state tax invalid demonstrates that a multiple tax by a state and another sovereign is likely to violate the Commerce Clause. The state of California had argued that the state tax was valid because the standards of *Complete Auto Transit, Inc. v. Brady* 430 U.S. 274 (1977) had been met. Those standards are that the state tax on interstate commerce is valid if the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

This contention was rejected by this Court for two reasons. The first was that "neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. As a result, apportionment would not guarantee that multiple burdens could not occur. 441 U.S. at 447-448.

The second reason was that a state tax on the instrumentalities of commerce "may impair federal uniformity in an area where federal uniformity is essential." 441 U.S. at 448. Because the Court felt that the California tax prevented this Nation from "speaking with one voice" in regulating foreign trade, the Court held the California tax violated the federal interest in uniformity. 441 U.S. 451-453.

The Court summarized the tests which a tax must meet to avoid an unlawful multiple taxation to be:

> In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto,* a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the federal government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause. 441 U.S. at 451.

There is good reason for applying the Commerce Clause so as to prevent multiple taxation of commerce by both states and Indian tribes. A 25 percent Tribal tax on the combined value of the contract price of the coal and the 30 percent Montana Coal Severance tax can only be viewed as multiple taxation in the extreme. Because the combined effect of these taxes is most likely to make the coal unsalable on an economic basis, there clearly has been no attempt to apportion these taxes and the burden on both interstate commerce and commerce with the Indian Tribes is obvious.

This Court should recognize that the development of vast mineral resources owned by Indian tribes throughout the Western part of the United States will be greatly hindered if multiple taxes on the development of these resources is permitted. Should the Court determine that tribes do have the power to tax mineral severance by non-Indians, the conclusion of the Court below that a Commerce Clause question is not even presented by State and Indian taxes on the same act of severance should not be permitted to stand.

CONCLUSION

For the foregoing reasons, Westmoreland Resources, Inc. respectfully urges the Court to reverse the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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